respect, think that the inference of an assignment was irresistible or even logical unless in no other way could the company have been at liberty to use the premises in succession to the partnership. It did not appear to have occurred to the judge to consider the likelihood, in the absence of proof to the contrary, that the company might well have carried on business in the premises on the same footing as the partnership had done.

In *Gian Singh's* case[5], the Privy Council declared that property used for partnership purposes is not necessarily partnership property. In the instant case there was no evidence that the lease was part of the partnership assets. If the lease was thus *not* necessarily partnership property, it would be erroneous to infer that the sale of the *business* by the firm to the company might or must be assumed to include an assignment of the lease. The four other grounds given by the judge were in our opinion of no relevance on the point. The acts referred to were dictated by practical convenience and had no other significance. What should have been considered as of the highest relevance was the question whether an assignment or subletting was a *sine qua non* to the company entering into occupation of the premises. In our view, it was absolutely unnecessary for any sale agreement to be executed, even as regards the business alone, since the vendors and purchasers were the same three individuals. We could not see how a mere description of the place of business could be construed to imply an assignment, not only of the business, but of the lessee's rights in the premises as well. We were therefore of opinion that in fact there was no assignment of the lease, that the company was let into occupation on the same footing as the firm — by leave and licence of the lessee — and that there was no breach of covenant which rendered the lease liable to forfeiture.

For the above reasons this appeal was allowed with costs and the judgment of the court below set aside.

*Appeal allowed.*

Solicitors: *Kam Woon Wah & Co.; Shook Lin & Bok.*

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## MUTHURAKU v. KUALA LUMPUR MUNICIPALITY WORKERS TRADE UNION

**[F.C. (Ong C.J. (Malaya), Gill and Ali F.JJ.) June 30,1972]**

**[Kuala Lumpur — Federal Court Civil Appeal No. 6 of 1972]**

*Trade Unions — Election of office bearers — Dispute between member and union — Whether court has jurisdiction to hear and adjudicate — Rules of Trade Union — Trade Union Ordinance, 1959, ss. 44 and 45.*

The appellant, the president of the respondent union, had issued a writ claiming *inter alia* a declaration that an emergency general meeting of the trade union which was held had no power to decide matters pertaining to the election of officers of the union. The appellant obtained *ex parte* an interim injunction restraining the trade union from holding a general meeting. Upon the application of the trade union this injunction was discharged by the High Court ([1972] 1 M.L.J. 165). It was held that the court had no power to adjudicate over the matter until the procedure for resolving a dispute in Part VI of the Trade Union Ordinance had been exhausted. It was common ground that the method of resolving the dispute by arbitration was not open to the parties. The appellant appealed from the decision of the High Court.

**Held:** under the rules of the trade union the dispute could only be referred to the Registrar of Trade Unions by consent of the parties, and as the appellant did not agree to do so, he was entitled to refer the matter to the court. The injunction should be restored.

*Cases referred to:-*

(1) *Kolandaisamy* v. *Annamulai and the Harbour Trade Union (Selangor) Port Swettenham* [1968] 1 M.L.J. 222.

(2) *Tharmalingam* v. *Sambanthan* [1961] M.L.J. 63.

(3) *Hanna Eissa Kawas* v. *Bishara Elias Kawas & others* [1943] 2 All E.R. 530, 531.

(4) *Lawlor* v. *Union of Post Office Workers* [1965] 1 Ch. 712, 733.

FEDERAL COURT.

*D. P. Vijandran* for the appellant.

*M. S. Naidu* for the respondents.

**Ong C.J.:** On August 28, 1971 the appellant, who was and still is president of the respondent union, issued a writ claiming *inter alia* a declaration that an emergency general meeting of the union held on July 18, 1971 had no power to decide matters pertaining to the election of officers of the Union. On the same date the appellant obtained *ex parte* an interim injunction restraining the Union, until trial of the action or further order, from holding the general meeting fixed for August 29, 1971 or any other general meeting. Upon the application of the union this injunction was discharged by an order of court made on January 7, 1972: *see [1972] 1 M.L.J. 165.* On appeal by the appellant against that order, we restored the injunction and now state the grounds of our decision.

The crux of the matter lies in the proper interpretation of Rule 26 of the Rules of this Union, read in the context of Part VI of the Trade Union Ordinance 1949 which comprises sections 44 to 46. This particular rule is in precisely the same terms as the Rule 26 which fell to be considered in *Kolandaisamy* v. *Annamalai & The Harbour Trade Union (Selangor) Port Swettenham.*[1] The relevant portions of the rule reads: —

"*Rule 26 — Disputes*

Every dispute between

(a) a member or person claiming through a member or under the Rules, on the one part, and the Union or an officer thereof, on the other part; or

(b) any person aggrieved who has ceased to be a member of the Union or any person claiming through such person aggrieved, on the one part, and the Union or an officer thereof, on the other part; or

(c) the Union and an officer of the Union;

*shall* be decided by reference to arbitration.

2. A panel of not less than five arbitrators, none of whom being directly or indirectly interested in the funds of the Union, shall be appointed as a Permanent panel of arbitrators by an annual general meeting, and any vacancy or vacancies shall be filled at a subsequent general meeting.

5. There shall be a right of appeal to the annual general meeting whose decision shall be binding and conclusive:

*Provided always* that in a dispute connected with

(a) the election of officers or the Union; or

(b) the accounts and funds of the Union; or

(c) the non-compliance with any Rule of the Union;
the parties to the dispute *may, by consent,* refer the dispute to the Registrar of Trade Union."

Section 44 of the Ordinance provides under sub-section (1) that every dispute between a member and the union "shall be decided in the manner directed by the rules of the trade union, and the decision so given shall be binding and conclusive on all parties; and application for the enforcement thereof may be made to a Sessions Court". Under sub-section (2) "the parties to a dispute in a registered trade union may, by consent (unless the rules of the union expressly forbid it) refer the dispute to the Registrar. Sub-section (5) provides that "where the rules of a trade union direct that disputes shall be referred to the courts, the dispute shall be determined by a Sessions Court" Sub-section (6) provides that "where no decision is made on a dispute within forty days after application to the union for a reference under its rules, the member or person aggrieved may apply to a Sessions Court and the Sessions Court may hear and determine the matter in dispute".

Section 45 goes on to provide as follows: —

"Notwithstanding anything contained in the Arbitration Ordinance, 1950, or in any other written law, a Sessions Court and the Registrar or any arbitrator or umpire to whom a dispute is referred under the rules of a registered trade union shall not be compelled to state a special case on any question of law arising in the case, but the Court or Registrar may, at the request of either party, state a case for the opinion of the High Court on any question of law, and may also grant to either party such discovery as to documents and otherwise, or such inspection of documents as might be granted by any court, and the discovery shall be made on behalf of the union by such officer thereof as the Sessions Court or the Registrar may determine."

It would appear that the learned judge considered the law settled by precedent in *Kolandaisamy's* case — as may be seen from the following passage in his judgment: —

"Before the plaintiff can say that the resolution passed on 18th July. 1971, is invalid he must come to court for a declaration that it is so. Before this court can make a declaration it must be empowered to adjudicate over the matter. That brings me to defendants' argument that this court has no jurisdiction. Before this court can have jurisdiction over the matter the procedure for resolving a dispute as prescribed in Part VI must be exhausted and the only way in which this court can have jurisdiction over the matter is by way of a case stated under the provisions of section 45 of the Trade Union Ordinance. In my view this case exemplifies the principle that when a statute creates an obligation and enforces the performance in a specified manner, that performance cannot be enforced in any other manner."

Unfortunately, in *Kolandaisamy's* case, perusal of the judgment did *not* disclose the material fact — which was expressly pleaded by the union in its defence — that there was in existence a panel of arbitrators, appointed pursuant to sub-rule (2) of rule 26, which was ready and available to determine the dispute when it arose. In the instant case, however, there was no such panel of arbitrators and it was common ground, as the judge pointed out, that arbitration was out of the question. Herein lies the essential difference between these two cases and the reason why we have allowed this appeal. Quite apart from the *ratio decidendi* stated by Gill J. (as he then was) at page 224, Kolandaisamy was bound by the rules of the union to resort to the domestic forum before seeking relief in court, so that, equally well, on the authority of *Tharmalingam* v. *Sambanthan,*[2] it was right that the court should disclaim any jurisdiction in the matter.

Since this appellant could not refer the dispute to arbitration, what alternative was left open for the dispute to be determined in the domestic forum? In our view the answer must be sought in rule 26 of this union. Since sub-rule (1) had no application, the only other method of resolving the dispute without resort to the courts is as set out in sub-rule (5). In the opinion of the learned trial judge, the appellant was obliged, in accordance with the proviso to this sub-rule, to refer the dispute to the Registrar of Trade Unions, whereupon it was only by way of a case stated under the provisions of section 45 of the Trade Unions Ordinance that the High Court could properly be seized of the matter. This, of course, involved the true construction of the proviso to sub-rule (5). Counsel for the parties contended for different interpretations which need not be gone into, but, having heard argument thereon, we were of opinion that the words "provided *always*" extend the scope of the proviso beyond the confines of sub-rule (5) itself to the entirety of rule 26. In other words, putting rule 26 in a nutshell, this rule says, in the first place, that all disputes "shall be decided by reference to arbitration", with a right of appeal by the dissatisfied party to the annual general meeting "whose decision shall be final and conclusive". The finality of such decision on appeal is naturally inconsistent with the Registrar serving as a "third tier" of reference, as Mr. Vijandran contended. In the result, the proviso must be taken to mean that, in all cases falling within paragraphs (a), (b) or (c) thereof, "the parties *may by consent* refer the dispute to the Registrar of Trade Unions". Thus rule 26 provides for disputes being either referred to the panel of arbitrators — where such a panel has been duly appointed — or, *by consent* of the disputants, to the Registrar. Consent must naturally be mutual and it is clear from the circumstances of this case that the appellant, by taking his case to the court, did not agree to refer the dispute to the Registrar. As Lord Macmillan said in *Hanna Eissa Kawas* v. *Bishara Elias Kawas & Ors.,*[3] delivering the judgment of the Privy Council: —

"In the case of a consensual jurisdiction absence of consent, whether due to unwillingness to consent or inability to consent, is equally fatal".

Consequently, all means of referring the matter to any person or body pursuant to rule 26 had been shewn to be inapplicable.

Under these circumstances then, was the learned trial judge correct in holding that, except by way of case stated pursuant to section 45 of the Ordinance, the High Court had no jurisdiction in the matter? A case stated postulates reference to the Registrar, which is a reference by consent. The *Sessions Court* only enters into the picture, provided that the rules of the union "direct that disputes shall be referred to the courts": see sub-section (5) of section 44 of the Ordinance. Rule 26 makes no such provision. Accordingly a case stated must be entirely out of the question, since section 45 of the Ordinance empowers either any arbitrator or the Registrar — but

no other person — to do so. When the appellant was shown to be no longer compellable by the provisions of rule 26 to resort to the domestic forum, it must follow as a matter of course that he had to seek redress in the courts. Since the court declined cognisance of the dispute, the appellant was left without any remedy for his grievance, whether fancied or legitimate. This was the very reason why we considered it essential in the interests of justice to allow this appeal and restore the injunction. To quote Ungoed-Thomas J. in *Lawlor* v. *Union of Post Office Workers*: —[4]

"Trade union rules clearly cannot oust the jurisdiction of the courts. Contracts, including a contract constituted by trade union rules, may provide that recourse to domestic tribunals shall be exhausted before there is recourse to the courts, and the courts may recognise and give effect to that contract; but that does not oust its jurisdiction. So in this case, the court has jurisdiction, and here there is no contractual provision requiring domestic remedies to be exhausted before resort to the courts. ... This case involves the construction of the rules of the trade union, and it is for the courts, and not a domestic body, to decide questions of construction, as matters of law."

The respondent union might or might not be right in their interpretation of the rules and in deciding as they did at the emergency general meeting: but there are clearly questions of law which can be determined only at the trial of this action. The respondents accordingly were ordered to pay the costs of this appeal.

**Gill & Ali F.JJ.** concurred.

*Order accordingly.*

Solicitors: *Athi Nahappan & Co.; Naidu & Co.*

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## *RE* S.R.C. AUGUSTIN

**[O.C.J. (Ong C.J.) July 28, 1972]**

**[Kuala Lumpur Petition for Admission and Enrolment as an Advocate and Solicitor No. 99 of 1971]**

*Advocate and Solicitor — Petition for admission — Whether petitioner a fit and proper person to be admitted to practice — Discretion of the court — Advocates and Solicitors Ordinance, 1947, s. 4.*

The petitioner applied for admission as an advocate and solicitor and his petition was opposed. It appeared that the petitioner had been sentenced by the Thai Military Court in 1962 for carrying opium without legal authority. As a result of that conviction, he was subsequently dismissed from the police force in Malaysia. Since 1964 there was nothing known to the discredit of the petitioner and he had been called to the Bar in England in 1969.

**Held:** in the circumstances of this case, the court would exercise its discretion to allow the petition.

*Case referred to:-*

(1) *In re Weare* [1893] 2 Q.B. 439, 447.

PETITION.

*N. Ramachandran* for the petitioner.

*Shiv Charan Singh* for the Attorney-General.

*N. Shankar* for the Bar Council.

*Raja Abdul Aziz Addruse* for the Selangor Bar Committee.

**Ong C.J.:** Mr. Augustin's petition for admission and enrolment as an advocate and solicitor was strenuously opposed, not only by the Solicitor-General, but also by the Malayan Bar Council and the Bar Committee of Selangor, on the ground that he is not a fit and proper person to be admitted to practise.

Mr. Augustin joined the police force on May 1, 1946. He had attained the rank of Acting Deputy Superintendent of Police when dismissed on April 16, 1965, after having been suspended from duty on February 27, 1963. The ground for his dismissal was conduct prejudicial to the good name and integrity of the Royal Federation of Malaya Police. On November 19, 1962 he had been found, near Songkhla in South Thailand, carrying in his car approximately 400 lbs. of opium without lawful authority. For this offence against Thai law he was sentenced by the Military Court at Songkhla to 4 years imprisonment. However, in consideration of his past services to Thailand he recovered his freedom in January 1964. As he had committed no offence on Malayan soil, he could not be prosecuted in our courts, but was duly dismissed from the police force. The objection to this petition is based on the same facts which led to his dismissal by the Police Commission.

At the outset I must say that, in my opinion it is only right and proper that the objection should be raised and heard. Otherwise silence might have been taken for acquiscence to the petition being granted as a matter of course. Mr. Shiv Charan Singh, representing the Solicitor-General, Mr. Shankar appearing on behalf of the Bar Council, and Raja Abdul Aziz Addruse for the Selangor Bar Committee, have argued against the petition with considerable force, albeit with utmost fairness. It was a distasteful task to rake up another man's past, but they had a duty to discharge in the public interest and for the good name of an honourable profession. For the presentation of their case, with delicacy and restraint, I must express to each my sincere appreciation.

The objection raised was not in respect of a mere peccadillo but misconduct of a serious nature. The facts cannot be glossed over. There is the public interest to consider. The clients of a legal practitioner are often illiterate and simple people. Would Mr. Augustin be able to look after their interests with scrupulous honesty and fidelity? If not, what of the high reputation for integrity in the profession he seeks to enter? Would not the mere fact of his admission tarnish the reputation of the body as a whole? Would he be a risk I should not foist on a professional body against their will? Section 4 of the Advocates and Solicitors Ordinance leaves the decision entirely to my discretion. It would be a simple matter to follow Pontius Pilate and wash my hands of responsibility by letting the majority view prevail. But, would that be in exercise of my discretion or a shirking of my duty? I have accordingly taken time to ponder over my decision and its consequences.

The Bar Council, I note, have been divided in their opinion. Those members who would not oppose Mr. Augustin's admission must have realised, as I do myself, that to bar the door to Mr. Augustin this time